

# Domestic Implementation of the Donor-Conceived Child's Right to Identity in Light of the Requirements of the UN Convention on the Rights of the Child

Donna Lyons\*

\*School of Law, Trinity College Dublin, Ireland

## ABSTRACT

This article considers the right to identity within Articles 7 and 8 of the United Nations Convention on the Rights of the Child. The article presents an original analysis of the Concluding Observations of the Committee on the Rights of the Child between 2007 and 2017 and concludes that the right to identity within the Convention extends to donor-conceived children. The article, therefore, suggests that it is essential that States Parties appropriately translate the requirements of the Convention into domestic law, thereby recognizing the right of the donor-conceived *child*, as well as the donor-conceived adult, to access identifying donor information. The article proceeds to explore the means by which the right may be guaranteed to this category of persons in practice. The principle research method employed in this article is doctrinal in nature.

## I. INTRODUCTION

'My mother', answered Telemachus, 'tells me that I am son to Odysseus, but it is a wise child that knows his own father' (Homer, *The Odyssey: Book I* (Samuel Butler translation), Wildside Press, 8).

The decision to restrict the age of access to identifying information in some countries around the world to after the age of 18 is purely based on the age of legal maturity and not based on any psychological or sociological evidence or research. It is vital information for the person conceived this way. . . Practice and policy should be predicated on the best interests of the child and not what the parents, clinicians, or donors want. If the child's best interests are better served by knowing this when they are young. . . then the age of 18 should be removed as a stipulation (Male, 41. Interview with the author (Adelaide, Australia, 3 June 2015)).

The United Nations Convention on the Rights of the Child (the Convention) was published in 1989 and at the time of writing has 196 States Parties.<sup>1</sup> The

Convention is a comprehensive document on the rights of children worldwide and all States Parties to the Convention are obliged to implement it as fully and effectively as possible (Detrick, 1999).

This article begins by providing a detailed analysis of the requirements of the right to identity within Articles 7 and 8 of the Convention. Following an original examination of the Concluding Observations of the Committee on the Rights of the Child (the Committee) between 2007 and 2017, it will be concluded that the right to identity in the Convention extends not only to adoptees, but also to donor-conceived people.

To date, there are 12 jurisdictions which have deemed anonymous donation to be contrary to domestic law. These jurisdictions hail from both civil and common law traditions and comprise Austria, Finland, Germany, the Netherlands, New South Wales, New Zealand, Norway, Sweden, Switzerland, the UK, Victoria, and Western Australia.<sup>2</sup> Norway and Finland are the only jurisdictions which permit access to donor information by the donor-conceived person upon attaining the age of 18, with no exceptions being made for access at an earlier age. All other jurisdictions provide for some access, even if very limited, under the age of 18, and of particular note are Austria, providing access at age 14, the Netherlands and Western Australia, providing access at age 16, Germany, providing access in principle at any age, and Victoria and Sweden, providing access at 'sufficient maturity'. Most recently, Ireland introduced a 'right to identity' for donor-conceived people above the age of 18 through the Children and Family Relationships Act 2015, the provisions of which have yet to be commenced. The Irish State justified this development, in part, on the basis that it wished to meet its obligations under the Convention (Joint Committee on Justice, Defence and Equality, 2014). This article will suggest that is essential that States Parties appropriately translate the requirements of the Convention into domestic law, thereby recognizing the right of the donor-conceived *child*, as well as the donor-conceived adult, to access identifying donor information.

In presenting this argument, I rely on a number of key sources. The text of the Convention is of crucial importance, as are the Concluding Observations issued by the Committee. Concluding Observations may be used as a guide to interpret the requirements of individual provisions of the Convention. The Committee has not issued any General Comments on the right to identity specifically, nor have any individual communications been heard regarding this right.<sup>3</sup> The United Nations Children's Fund (UNICEF) Implementation Handbook will also be considered in interpreting the relevant provisions of the Convention. The Handbook is a 'well-known practical tool used by governments, UNICEF, and other United Nations agencies, as well as non-governmental organizations, human rights institutions and academics, to guide them on the implementation of the Convention' (Hodgkin and Newell, 2007: Foreword).<sup>4</sup> Where relevant, General Comments issued by the Committee interpreting other Convention Articles will be referred to. General Comments are regarded as constituting authoritative interpretations of the substantive rights conferred by the Convention and therefore represent one of a number of interpretive resources available to States Parties in informing their understanding of their Convention obligations.

It should be noted that this article does not examine the precise definition of 'identifying donor information' in practice. However, identifying donor information will generally include an individual's name, date of birth, last known address and it may include a photograph. In order to avoid undue repetition, I will also use the terms 'genetic information', 'donor information', and 'information relating to genetic origins' throughout to refer to 'identifying donor information'.

## II. THE RIGHT TO IDENTITY IN THE CONVENTION ON THE RIGHTS OF THE CHILD

Two primary Convention Articles recognize the right to identity, namely, Articles 7 and 8.

Article 7(1) provides as follows:

1. The child shall be registered immediately after birth and shall have the right from birth to a name, the right to acquire a nationality and, as far as possible, *the right to know* and be cared for by his or her parents. (Emphasis added)

Freeman suggests that the term 'parents' in Article 7 includes not only social or legal parents, but also biological or genetic parents (Freeman, 1996). Article 8 of the Convention further provides:

1. States Parties undertake to respect the right of the child to preserve his or her identity, including nationality, name and family relations as recognized by law without unlawful interference.
2. Where a child is illegally deprived of some or all of the elements of his or her identity, States Parties shall provide appropriate assistance and protection, with a view to re-establishing his or her identity.

It has been pointed out that, taken together, Articles 7 and 8 provide a strong argument in favour of a right to know for those who have been adopted, and, by extension, for donor-conceived people:

[T]he arguments for children born by AID [assisted insemination by donor] to have access as children to the name of the genetic donors are similar to the rights of adopted children to have access to the identity of their biological parents are equally compelling. It would be inconsistent to argue for the rights of adopted children and against the rights of those born by AID (Van Bueren, 1995).

While it has been suggested that such an interpretation was not the original intention of the drafters of the Convention (Fortin, 2009: 470), it will be seen below that the Committee on the Rights of the Child has repeatedly interpreted Articles 7 and 8 to extend identity rights to both adoptees and donor-conceived individuals. Indeed, the Committee has frequently reminded those states which entered reservations with respect to Article 7 about the importance of the right to identity in this context. Three states originally entered such reservations (Committee on the Rights of the Child,

1999), one of which (UK) has since introduced legislation recognizing the right of the donor-conceived person to know their genetic parents,<sup>5</sup> and two of which (Czech Republic and Luxembourg) have taken steps to introduce similar legislation.<sup>6</sup> Notwithstanding the reservations entered by these states, the Implementation Handbook suggests that ‘a reasonable assumption is that, as far as the child’s right to know his or her parents is concerned, the definition of “parents” includes genetic parents’ (Hodgkin and Newell, 2007: 105–6). The Committee on the Rights of the Child has commented on the right to know in Articles 7 and 8 through its Concluding Observations. An analysis of these statements provides ample evidence that the right to know in the Convention is guaranteed not just to those who have been adopted, but also to children born through assisted reproduction.

In the adoption context, the Committee has repeatedly expressed its concern regarding national legislation which protects the anonymity of biological parents (Committee on the Rights of the Child, 2004; Committee on the Rights of the Child, 2005a; Committee on the Rights of the Child, 2006a). The Committee has also been critical of policies permitting anonymous births more generally (Committee on the Rights of the Child, 2005b). Importantly, the Committee has made a number of statements regarding Articles 7 and 8 and their application to assisted reproduction specifically. Each has highlighted the importance of recognizing the right of the donor-conceived child to access information about their genetic origins. In its Concluding Observations on Norway, for example, the Committee stated the following:

Concerning the right of the child to know his or her origins, the Committee notes the possible contradiction between this provision of the Convention with the policy of the State Party in relation to artificial insemination, namely in keeping the identity of sperm donors secret (Committee on the Rights of the Child, 1994: para 10).

Commenting on the situation in Switzerland, the Committee has emphasized that a law that recognizes the right to identity but which does not unambiguously protect that right in practice will be a cause for concern:

The Committee notes that, according to... the law on Medically Assisted Procreation, a child can be informed of the identity of his/her father only if he/she has a legitimate interest and is concerned at the meaning of ‘legitimate interest’ in that regard... the Committee, recommends that the State Party ensure, as far as possible, respect for the child’s right to know his or her parents’ identities (Committee on the Rights of the Child, 2002a: paras 28–29).

The Committee, in its 1995 Concluding Observations on reports submitted by Denmark, noted that national legislation did not recognize the right of the donor-conceived person to access information about the donor, and thus stated as follows:

Concerning the right of a child to know his or her origins, the Committee notes a possible contradiction between this provision of the Convention

[Article 7] and the policy of the State party with respect to artificial insemination ([Committee on the Rights of the Child, 1995](#): para 11).

Moreover, in its 2002 Concluding Observations on reports submitted by the UK, the Committee has made it clear that the right to identity extends to children born through assisted reproduction:

While noting the recent Adoption and Children Bill (2002), the Committee is concerned that children born out of wedlock, adopted children, or children born in the context of a medically assisted fertilization do not have the right to know the identity of their biological parents ([Committee on the Rights of the Child, 2002b](#): para 8).<sup>7</sup>

The Implementation Handbook has addressed the commonly made argument that unless their anonymity is secured, potential gamete donors will be deterred, fearing future embarrassment, or even maintenance suits by their biological children. However, the Handbook responds to this concern by noting that 'legislation can protect a donor parent from maintenance suits and the experience of some countries suggests that donors are not deterred by the possibility of being identified, though numbers may fall initially' ([Hodgkin and Newell, 2007](#), 108). Moreover, the Handbook makes it clear that legislation in this area must be child- rather than adult-centric:

In any event, the law on artificial forms of fertilization, as with adoption, should be framed to protect the rights and well-being of children, and not to meet the needs of childless couples ([Hodgkin and Newell, 2007](#): 108).

It is clear, therefore, that the child's right to know takes precedence over any potential privacy or reproductive rights which may be claimed by either the donor or the intending parents. The Handbook allays any potential concerns that by guaranteeing the right to know, the Convention would not be prioritizing the child's best interests:

[C]hildren's best interests and sense of identity may be sustained without having to deny them knowledge of their origins, for example after reception into state care, through 'secret' adoption or *anonymous egg/sperm donations* and so forth . . . . ([Hodgkin and Newell, 2007](#): 108) (emphasis added).

It should be noted that while the Committee on the Rights of the Child has interpreted Article 7 of the Convention to include the donor-conceived individual's right to know their genetic parents, it has not suggested that the donor-conceived child possesses a similar right to 'be cared for' by their parents (Article 7). Nor has the Committee implied that the term 'parents' should include genetic parents for the purposes of references to parents in later provisions of the Convention. Whether the Committee will broaden its definition of the parent in relation to the Convention as a whole has yet to be seen, and is therefore outside the scope of the present discussion.

The following section will provide an analysis of the Committee's most recent pronouncements relating to Articles 7 and 8.

### III. CONCLUDING OBSERVATIONS OF THE COMMITTEE: 2007–2017

Scholarly examinations (Blyth and Farrand, 2004)<sup>8</sup> and official interpretations (Hodgkin and Newell, 2007)<sup>9</sup> of the right to identity provisions in the Convention provide an overview of the Committee's Concluding Observations relating to the right to identity up to 2007. As a result of the lack of an existing systematic examination of the Committee's Concluding Observations subsequent to that year, I have conducted such an examination for the period 2007–2017.

#### 1. Methodology

The Concluding Observations were accessible on the website of the Office of the High Commissioner for Human Rights (OHCHR). A search function appears on the relevant section of the website (OHCHR, 2017b), providing an opportunity to search the Committee's Concluding Observations for 'symbol' and 'date' but unfortunately there was no possibility for searching the documents for keywords, such as 'identity'. The website indicated that 333 Concluding Observations had been issued by the Committee between 2007 and 2017.<sup>10</sup> As I was particularly interested in the right to identity (Articles 7 and 8 of the Convention), I excluded from my examination any of those Concluding Observations which dealt solely with the Convention's 'Optional Protocols'. There was no further means of narrowing down the potentially relevant documents, as I was interested in all global regions between the dates in question.

I created a Microsoft Excel spreadsheet including all Concluding Observations relating to the primary text of the Convention (185) in total, within which I documented the country, citation of statement, date, and the link to the statement on the website. I proceeded to open systematically each link, searching each document individually for the terms 'identity', 'know' (capturing the 'right to know'), 'donor', 'donor-con' (to capture 'donor-conceived' or 'donor-conception' should a hyphen have been used), and 'reprod' (to capture potential references to 'reproduction' or 'reproductive'). Eighty-two of the documents did not recognize any of the above terms, and 103 documents did; information which I then included in the Excel spreadsheet. I investigated each of the 103 further, noting that many references to such terms were not applicable to the right to identity provisions in the context of donor conception (e.g. 'identity' was referred to frequently in the context of gender identity and the identity rights of migrant children). The right to identity in the context of traditional reproduction (anonymous births specifically), adoption and assisted reproduction was referred to in 18 Concluding Observations in total. Two Concluding Observations referred to the right to identity in the assisted reproduction context specifically (Israel 2013 and Switzerland 2015). These findings are discussed below.

**Table 1. Relevant concluding observations 2007–2017**

Jurisdiction	Date	Citation	Subject matter
Azerbaijan	11 March 2012	CRC/C/AZE/CO/3–4	Adoption
Barbados	3 March 2017	CRC/C/BRB/CO/2	Adoption
Bulgaria	21 November 2016	CRC/C/BGR/CO/3–5	Adoption
Belgium	18 June 2010	CRC/C/BEL/CO/3–4	Adoption
Canada	6 December 2012	CRC/C/CAN/CO/3–4	Adoption
Czech Republic	4 August 2011	CRC/C/CZE/CO/3–4	Assisted reproduction; adoption
France	22 June 2009	CRC/C/FRA/CO/4	Adoption
Germany	24 February 2014	CRC/C/DEU/CO/3–4	Anonymous births
Guatemala	25 October 2010	CRC/C/GTM/CO/3–4	Adoption
Holy See	24 February 2014	CRC/C/VAT/CO/2	Anonymous births
India	6 July 2014	CRC/C/IND/CO/3–4	Anonymous births
Israel	4 July 2013	CRC/C/ISR/CO/2–4	Assisted reproduction; adoption
Lithuania	29 October 2013	CRC/C/LTU/CO/3–4	Anonymous births
Luxembourg	28 October 2013	CRC/C/LUX/CO/3–4	Anonymous births
Macedonia	23 June 2010	CRC/C/MKD/CO/2	Adoption
Slovakia	20 July 2016	CRC/C/SVK/CO/3–5	Anonymous births
Switzerland	25 February 2015	CRC/C/CHE/CO/2–4	Assisted reproduction; anonymous births
Uzbekistan	10 July 2013	CRC/C/UZB/CO/3–4	Adoption

## 2. Findings

Table 1, below, presents those Concluding Observations of relevance to the right to identity as issued by the Committee between the years 2007 and 2017.

It will be observed that many of the above statements deal with the situations of anonymous births and adoption, as well as commenting upon scenarios involving assisted reproduction. While authoritative interpretations regarding adoption and anonymous births may not be directly applicable to the donor conception context, they are nonetheless indicative of a continuing general trend in favour of guaranteeing the identity rights of children to know their biological or genetic parents through the Convention. The Committee's specific consideration of Articles 7 and 8 in the context of donor conception will be examined in due course.

Throughout 2007–2017, the Committee has reiterated its previous position that permitting the practice of anonymous abandonment of children is contrary to the Convention. Therefore, commenting on Germany in 2014, the Committee stated:

The Committee strongly urges the State party to take all the measures necessary to end the practice of anonymous abandonment of children and to strengthen and promote alternatives as soon as possible. . . In that respect, taking into account the duty to fully comply with all provisions of the Convention, the State party should keep a confidential record of the parents,

to which the child could have access at a later stage ([Committee on the Rights of the Child, 2014a: 31](#)).<sup>11</sup>

The Committee has also remained strongly opposed to national policies protecting the anonymity of birth mothers in the context of adoption. Commenting on France in 2009, the Committee stated as follows:

The Committee takes note of the information provided by the State party on the measures undertaken. . . in facilitating the child's access to his or her origins. Nevertheless, the Committee expresses concern at the long waiting period for new inquiries [relating to birth mothers]. The Committee also remains concerned that the mother, if she so wishes, can conceal her identity and oppose the right of the child to know his or her origins, depriving the child of a part of his or her rights ([Committee on the Rights of the Child, 2009a: para 43](#)).

The Committee's position on anonymity in adoption as being contrary to Articles 7 and 8 is evident throughout the Concluding Observations between 2007 and 2017. A selection of extracts is provided below.

While noting that the State party intends to adopt a law to guarantee the right of the child to know his/her origin, the Committee is concerned about the absence of clear modalities for gathering, conserving and accessing information contained in the adoption files, including the identity of the parents and medical information concerning children and their families ([Committee on the Rights of the Child 2010a: para 52](#)).

The Committee is concerned about the practice of 'secret' adoption and that legislation allows for adopted children to be registered with the names of the adoptive parents and for the identity of the biological parents not be revealed, and that the law does not require the preservation of information concerning the child's origin, in particular information concerning the identity of the biological parents, as well as the medical history ([Committee on the Rights of the Child, 2010b: para 34](#)).

While noting that Article 14 of the PINA Law [Protección Integral de la Niñez y Adolescencia] establishes the right of children to identity, the Committee remains concerned at the lack of an adequate mechanism to search for the origin of children deprived of their identity, especially those who have been subject to international adoption and whose rights to preserve their identity have been violated ([Committee on the Rights of the Child, 2010c: para 64](#)).

The Committee recommends that the State party review its legislation and practices on adoption. In the light of article 3 of the Convention, on the best interests of the child, article 5 on the rights and duties of parents and article 12 on the right of the child to express his or her opinion, the Committee recommends in particular that the State party. . . undertake legislative and other measures to ensure the preservation of information on the origin of adopted

children, in particular information concerning the identity and medical history of the biological parents, and ensure that children are informed about the fact of their adoption and have access to such information at the appropriate age and level of development ([Committee on the Rights of the Child, 2012a](#): para 55).

The Committee is concerned about the provisions of the Adoption of Children Law which allows hiding from a child the fact that he or she has been adopted. . . . In the light of article 7 of the Convention, the Committee recommends that the State party ensure, as far as possible, respect for the child's right to know his or her parents' identity in the case of an adopted child . . . ([Committee on the Rights of the Child, 2013b](#): paras 31–32).

The Committee. . . in particular recommends that the State party. . . ensure that adopted children at the appropriate age have the right to access information on the identity of their biological parents and to be prepared for this . . . ([Committee on the Rights of the Child, 2013c](#): para 7).

It is clear from the foregoing that the Committee considers the practice of anonymous adoption to be contrary to the Convention, and that States Parties must ensure, not simply that the right is recognized in the abstract, but also that children are informed about their adopted status so that they may have their rights recognized, and that effective mechanisms are put in place for obtaining information about birth parents so that this may be released to the adopted child at a later date.

Between the years 2007 and 2017, the Committee has also made general statements about the right to identity, as well as statements relating to the assisted reproduction context specifically. Commenting on the situation in France in 2009, the Committee referred to the general right to identity in Article 7 as including a right to know both parents and siblings:

The Committee reiterates its previous recommendation to the State party to take all appropriate measures to fully enforce the child's right to know his or her biological parents and siblings, as enshrined in article 7 of the Convention and in the light of the principles of non-discrimination (art. 2) and the best interests of the child (art. 3). The Committee further recommends the State party to ensure that new inquiries are treated in a timely fashion; ([Committee on the Rights of the Child, 2009a](#): para 44).

Moreover, the Committee reiterates the relationship between the right to identity in the Convention and the Convention's general principles, in particular, non-discrimination and the best interests of the child. The importance of these principles for the interpretation of the right to identity in the Convention is explored in more detail below. The Committee, providing feedback in 2012 on Canada's performance, welcomed the recent court decision in *Ontario v Marchand* ([2006] OJ no 2387) which ruled that children, both adopted and donor-conceived, have the right to know the identity of both biological parents development ([Committee on the Rights](#)

of the Child, 2012b). Commenting on the situation in Czech Republic in 2011, the Committee observed:

While noting that the State party has been making efforts to amend its Civil Code to include a specific provision on the right of the child to know his or her biological parents and preserve his or her identity, the Committee remains concerned at the continued reservation to this article of the Convention by the State party. . . the Committee recommends that the State party consider withdrawing the reservation made to article 7, paragraph 1, of the Convention (Committee on the Rights of the Child, 2011: paras 8–9).

The reservation entered by the Czech Republic concerned both adoption and assisted reproduction, and the Committee is therefore reiterating its position that Article 7 applies to both contexts. The Committee has also emphasized the relevance of the Convention's right to identity in the assisted reproduction context specifically.

Providing feedback in 2013 on the legal situation in Israel, the Committee stated:

The Committee recommends that, in the regulation of assisted reproduction technologies, particularly with the involvement of surrogate mothers, the State party ensure respect for the rights of children to have their best interests taken as a primary consideration and to have access to information about their origins (Committee on the Rights of the Child, 2013b: para 34).

Here, the Committee is reiterating previous statements to the effect that the Convention provides that it is in best interests of the child born through assisted reproduction to receive information about their genetic origins. Moreover, commenting on Switzerland in 2015:

The Committee recommends that the State party intensify its efforts to ensure, as far as possible, respect for the right of an adopted child or a child born as a result of medically assisted procreation to know his or her origin (Committee on the Rights of the Child, 2015: paras 32–33).

While the number of statements made by the Committee on the question of the right to identity in the context of assisted reproduction may be small, the Committee's position in recent years is clearly consistent with its previous line of reasoning. The Convention, therefore, continues to guarantee the right of the donor-conceived person to know their biological parents and siblings, and thus the Committee considers such a right to be in the best interests of the child. The following section will consider whether the Convention requires domestic legislation to recognize not just the right of the donor-conceived adult to information about the donor, but also the right of the donor-conceived *child* to obtain this information.

### 3. The *Child's* Right to Identity in the Convention

As Besson has pointed out, '[t]he 1989 CRC is the first human rights convention to contain provisions granting explicitly not only the adult's, but also the child's right to

know her origins' (Besson, 2007, 142). Article 1 of the Convention provides that a child 'means every human being below the age of 18 years unless under the law applicable to the child, majority is attained earlier'.

The foregoing discussion examined the approach of the Committee on the Rights of the Child in the context of the right to identity, and concluded that the Committee has extended the application of Articles 7 and 8 to both adoptees and donor-conceived people. As the Convention is a treaty that deals specifically with children's rights, that is, the rights of those under the age of 18, the Committee's statements ultimately extend the right to identity to the donor-conceived *child*. There are numerous examples of this position above, but the Concluding Observations issued with respect to one country in particular is sufficiently noteworthy to be repeated at this point. Commenting on the situation in Switzerland, the Committee has on two separate occasions emphasized that a law that recognizes the right to identity but which does not unambiguously protect that right in practice will be a cause for concern. In 2002, as noted above, the Committee stated as follows:

The Committee notes that, according to... the law on Medically Assisted Procreation, a child can be informed of the identity of his/her father only if he/she has a legitimate interest and is concerned at the meaning of 'legitimate interest' in that regard... the Committee, recommends that the State Party ensure, as far as possible, respect for the child's right to know his or her parents' identities (Committee on the Rights of the Child, 2002a: paras 28–29).

Commenting again in 2015, the Committee expanded on its previous recommendation:

The Committee notes that according to article 268(c) of the Swiss Civil Code on adoption, and article 27 of the Federal Act on Medically Assisted Reproduction, the child can only be informed of the identity of his or her biological parents on the condition that he or she has a 'legitimate interest'. The Committee remains concerned about whether the concept of 'legitimate interest' is always in line with the best interests of the child... The Committee recommends that the State party intensify its efforts to ensure, as far as possible, respect for the right of an adopted child or a child born as a result of medically assisted procreation to know his or her origin. The Committee recommends in particular that the State party consider the removal of a reference to legitimate interests as a precondition for the child's right to request information regarding his or her biological origin (Committee on the Rights of the Child, 2015, paras 32–33).

While the Committee has on many occasions requested states to introduce legislation which ensures that donor-conceived children have identity rights, this is an interesting comment because it is the only occasion on which the Committee has directly referred to a law which specifically grants donor-conceived people under the age of 18 the right to access donor information. Article 27(1) of the Federal Act on Medically Assisted Reproduction 1998 provides that '[o]nce the child has reached

18 years of age, he or she may request information from the Federal Office about the donor's physical appearance and personal data'. Personal data is defined in Article 24(1) as 'family name and first name, date and place of birth, place of residence, place of origin in Switzerland or nationality, occupation and education'. Article 27(2) further provides that 'the child may at any time request information on all the data relating to the donor. . . if he or she has a legitimate interest in obtaining it'. 'All data' includes the personal information of the donor under the 1998 Act. Therefore, the fact that the Swiss legislation permits individuals to access identifying donor information upon reaching the age of 18 was not sufficient for the Committee. Instead, the Committee has, through its 2002 and 2015 Concluding Observations, made it clear that the child must also have access to such information and that any protections afforded to the child through legislation must be sufficiently clear to guarantee the right in practice, rather than simply referring to the right in the abstract.

This is a logical position, given the fact the Convention is first and foremost a document for the protection of the rights of the child, and the first international treaty to expressly recognize the right to identity. According to Besson:

The importance of the interests protected by the right to know one's origins does not decrease with age. As a consequence, the bearers of the right to know one's origins are children as much as adults. The search for one's origins is indeed part of the search for one's identity and the right to know protects an interest that is as vital to a child as it is to an adult. . . the specificity of. . . Articles 7 and 8 of the CRC in this respect is to focus on the child's right only (Besson, 2007: 144).

While the right to identity is clearly a right which belongs to the donor-conceived child, it is worth exploring further how the Committee envisages the protection of the right in practice. The Committee's Concluding Observations on the right to identity in the adoption context shed some light on this question. In this regard, a selection of the Committee's statements is provided below.

The Committee. . . in particular recommends that the State party. . . ensure that adopted children *at the appropriate age* have the right to access information on the identity of their biological parents and to be prepared for this . . . (Committee on the Rights of the Child, 2013c: para 7) (Emphasis added).

The Committee urges the State Party. . . to ensure that adopted children *at the appropriate age* have the right to access the identity of their biological parents. . . (Committee on the Rights of the Child, 2006a, paras 40–41)(Emphasis added).

The Committee recommends that the State Party undertake legislative and other measures to ensure the preservation of information on the origin of adopted children, in particular information concerning the identity of biological parents, as well as medical history, and ensure that children are informed about the fact of their adoption *and have access to such information at the*

*appropriate age and level of development*' (Committee on the Rights of the Child, 2010b: para 35). (Emphasis added)

The Committee recommends that the State party review its legislation and practices on adoption. In the light of article 3 of the Convention, on the best interests of the child, article 5 on the rights and duties of parents and article 12 on the right of the child to express his or her opinion, the Committee recommends in particular that the State party... undertake legislative and other measures to ensure the preservation of information on the origin of adopted children, in particular information concerning the identity and medical history of the biological parents, and ensure that children are informed about the fact of their adoption *and have access to such information at the appropriate age and level of development* (Committee on the Rights of the Child, 2012a: para 55). (Emphasis added)

The Committee notes with concern that the right of an adopted child to know his or her original identity is not protected in the State Party... The Committee encourages the State Party to protect the right of the adopted child to know his or her original identity, establishing appropriate legal procedures for this purpose, *including recommended age* and professional support measures (Committee on the Rights of the Child, 2005a: paras 40–41). (Emphasis added)

The Committee thus envisages that information about biological parents should be provided to children at an appropriate age and level of development, and that the state may make recommendations about what an appropriate age might be in this context. As is evident from the Committee's statement on Azerbaijan, above, the best interests of the child (Article 3) requires that Articles 5 and 12 of the Convention be used as guiding principles in the implementation of the right to identity. Article 5 of the Convention provides as follows:

States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention.

Article 12 further states:

1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child,

either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

Thus, the donor-conceived child who is capable of forming their views should be given an opportunity to express those views freely and such views should be taken into account in accordance with the child's age and maturity. Moreover, the child's parents have a right and a duty to provide direction and guidance to the child in the exercise of their right to donor information, in a manner consistent with the child's evolving capacities. It should be noted that the term 'parents' in this context refers to the child's legal or social parents, rather than their genetic parents (where a distinction exists), and whether the Committee should at some future date extend the definition of 'parents' to include genetic parents more broadly for the purposes of the entire Convention is outside the scope of this article. Acknowledging Article 5, General Comment 4 on Adolescent Health and Development notes:

The Committee believes that parents or other persons legally responsible for the child need to fulfil with care their right and responsibility to provide direction and guidance to their adolescent children in the exercise by the latter of their rights. They have an obligation to take into account the adolescents' views, in accordance with their age and maturity, and to provide a safe and supportive environment in which the adolescent can develop. Adolescents need to be recognized by the members of their family environment as active rights holders who have the capacity to become full and responsible citizens, given the proper guidance and direction ([Committee on the Rights of the Child, 2003](#): para 7).

The outcome of an exchange between parent and child about access to donor information will vary, depending on the age and maturity of the child. The Implementation Handbook, therefore, states:

[T]he Convention's articles 5 (evolving capacities of the child) and 12 (child's opinion) suggest that the determination of what is or is not in the child's best interests so far as knowledge of origins is concerned may not be made just at one point during the child's life. The best interests of a 6-year-old in relation to this issue may be quite different from the best interests of a 16-year-old ([Hodgkin and Newell, 2007](#): 107).

Van Bueren further notes that Article 7 clearly bestows on the donor-conceived child a right to access genetic information, and thus that '[t]he only point at issue ought to be whether the child is sufficiently mature to be able to benefit from access to such records' ([Van Bueren, 1995](#): 125).

Who is charged with the responsibility of determining 'sufficient maturity'? This could be done either by the child's parents or by the state. Article 18 could be cited in favour of requiring the child's legal parents to determine whether or not the child is sufficiently mature to receive donor records. Article 18(1) notes that parents 'have the primary responsibility for the upbringing and development of the child. The best

interests of the child will be their basic concern'. As the Committee has made it clear that granting the child access to donor information in accordance with their age and maturity is in the child's best interests, Article 18 suggests that it is the parents' responsibility to guarantee to the child this right. Taking Article 18 together with Article 5, which recognizes the right and duty of parents to provide appropriate guidance to their children in exercising their Convention rights in accordance with their age and maturity, it would seem that parents, rather than the state, have the primary responsibility for determining the child's 'sufficient maturity' for the purposes of the appropriate age at which that child should obtain donor information. Finally, in accordance with Article 12, parents should allow the child to express their views on the matter and give due consideration to such views in accordance with the child's age and maturity.

Should children have access to donor information independently of their parents, in spite of Article 18? This might arise, for example, where parents refused to obtain donor information on behalf of their children, where parents were not willing to recognize that a child may have reached a sufficient level of maturity prior to attaining the age of majority, or where adolescents wished to obtain the relevant information but preferred to do this without the direction of their parents. This matter will be considered in the following section.

#### **4. Obtaining Donor Information without Parental Consent**

While the Committee has clearly concluded that donor-conceived children have the right to donor information, it has not stated conclusively that such information should be obtainable without parental consent. This issue, therefore, requires further investigation.

##### *A. Family Autonomy and the Right of the Child to Family Life*

While the Convention is clearly child-centric, it places an emphasis on the importance of the family as being in the child's best interests and thus the question of the relevance of the principle of family autonomy arises. The Preamble to the Convention states that the family is 'the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children' and that 'the child, for the full and harmonious development of his or her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding'. Moreover, as was noted above, Article 18(1) provides that legal parents 'have the primary responsibility for the upbringing and development of the child. The best interests of the child will be their basic concern'. Thus, the right to parental autonomy, and in turn the right of the child to family life, hinges on concept of the best interests of the child.

The best interests test is fundamental to the operation of family autonomy. Therefore, Article 20 of the Convention provides that alternative care may be provided for the child, thus 'temporarily or permanently' depriving the child of their family environment, where it is not in the child's best interests to 'be allowed to remain in that environment'. The state is thus entitled to interfere in family life on the grounds of best interests alone. Since Article 18(1) requires parents to rear their

children consistent with the principle of the best interests of the child, parents wishing to withhold consent to the child's accessing of genetic information, would have to be able to prove that it was not in the child's best interests to receive the information. Moreover, where the child seeks to obtain genetic information without the consent or knowledge of their parents, the state will be entitled to assess the situation on the basis of the best interests principle. The Committee will not accept lightly any restriction of the child's identity rights on the grounds of their best interests. Therefore, the Implementation Handbook states:

[I]t is clear that children's right to know their parentage could only be refused on the grounds of best interests *in the most extreme and unambiguous circumstances*, and children should be given the opportunity for this decision to be reviewed at a later date (Hodgkin and Newell, 2007: 107). (Emphasis added)

How might the decision-maker determine whether a scenario is an 'extreme and unambiguous' one for the purposes of declining genetic information on the basis that the granting of such information is not in the best interests of the child? In order to conclude that a course of action is unambiguously contrary to the best interests of the child, one must have some grasp of the definition of 'best interests' itself. This is no simple feat and thus will be explored at this juncture.

### B. The 'Best Interests' Analysis in the Context of Identity

Article 3(1) of Convention requires that in all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, 'the best interests of the child shall be a primary consideration'.<sup>12</sup> Article 3(1) is both a right and a principle of interpretation which should be applied to all of the rights in the Convention. The principle underpins all other guiding principles in the Convention (Fortin, 2005).<sup>13</sup> The rationale for implementing children's rights subject to the best interests principle is that if the application of the child's rights under the Convention is in some circumstances to risk harming the child, and therefore to defeat the object of those rights, the interpretation and application of the Convention rights must be achieved in accordance with the best interests of the individual child concerned (MacDonald, 2011). According to Alston, the principle is 'an aid to construction as well as an element which needs to be taken fully into account in implementing other rights' and it is 'a mediating principle which can assist in resolving conflicts between different rights where these arise within the overall framework of the Convention' (Alston, 2004: 198).

In order to determine the best interests of the child under the Convention, it is essential that the interpreter have regard to the other primary guiding principles in the Convention (Hodgkin and Newell, 2007). Moreover, any determination of the child's best interests must be consistent with the overall spirit of the Convention (Hodgkin and Newell, 2007). It is also important to note that states are discouraged from interpreting the best interests of the child in an overly 'culturally relativist' way and thus cannot use their own interpretation of the principle to deny a child their basic rights under the Convention (Hodgkin and Newell, 2007).

General Comment number 14, issued by the Committee on the Rights of the Child in 2013 ([Committee on the Rights of the Child, 2013d](#)), emphasizes that there is no hierarchy of rights in the Convention, with all the Convention rights being considered to be in the child's best interests. As such, no Convention right may be considered *not* to be in a child's best interests. States are entitled to consider interests that compete with those of the child when considering the best interests principle. Therefore, the interests of other children, adults, the public interest, and the interests of justice may be relevant considerations when determining the best interests of the child as *a* primary consideration. Blyth and Farrand point out the difficulty with this position:

Since the Convention refers to the best interests of the child only as *a* primary consideration, and not *the* primary consideration, it cannot be relied upon to give the best interests of children any degree of priority compared to the best interests of others, or indeed any other priority ([Blyth and Farrand, 2004: 93](#)).

This is a compelling argument, but it is worth noting that through General Comment 14 the Committee has emphasized the importance of not undermining the primary nature of the child's interests in Article 3(1), and has thus hinted at the importance of prioritizing the best interests of the child over the interests of others ([Committee on the Rights of the Child, 2013d](#)). Moreover, as noted above, in the right to identity context, the Committee has made it clear that it is generally in the best interests of the child to receive genetic information.

It should also be noted that there may be some advantages to the vagueness inherent in the concept. As Zermatten points out:

[T]here are advantages in a broad, flexible and responsive (relative to time and space) concept that can be adapted to the diverse cultural, socio-economic differences of various legal systems. In this sense, the principle is a practical tool that can be applied everywhere and is useful to all. . . It is the instrument which provides the link between theory and reality ([Zermatten, 2010: 495](#)).

Clarity and stringency can be essential in the development of a minimum standard of welfare for children, but a degree of flexibility may also allow the decision-maker to ensure a fair outcome for the child in as many cases as possible. While this may be a subjective conception of fairness, it may nonetheless be useful in unpredictable scenarios for which it is impossible to provide detailed guidance in advance. MacDonald therefore states:

Whilst some commentators argue that substantive rules are preferable to the 'best interests' concept, there is a pressing need with regard to children (and adults) to take into account the myriad of situations created by the confluence of the applicable law and the child's family situation, developmental stage, views and needs if the decision maker is to do justice to the position of the child as an individual ([MacDonald, 2011: 185](#)).

Considering the participation rights of the child under Articles 5 and 12 in tandem with the best interests principle may be useful in assisting the decision-maker to determine whether an exception should be made to the presumption that the access to donor information is in the best interests of the child. As noted above, such an exception could only be made in the most 'extreme and unambiguous' of circumstances, but such a determination could nonetheless be influenced by subjective moral standards, so obtaining guidance on the matter through Articles 5 and 12 will be of assistance.

### *C. Employing Articles 5 and 12 of the Convention in Assessing Best Interests*

In balancing the right of the child to identity with the right to parental autonomy, that is, the right which a parent may claim to withhold consent to the release of donor records, guidance may be found in the right of the child to participate in accordance with their age and maturity by virtue of Articles 5 and 12 of the Convention.

At the outset, it is noteworthy that Eekelaar has touched upon the importance of viewing the best interests principle and the participation rights of the child in unison. He proposes a method of decision-making in place of the best interests principle, described as the concept of 'dynamic self-determinism' which is intended to 'bring a child to the threshold of adulthood with the maximum opportunities to form and pursue life-goals which reflect as closely as possible an autonomous choice' (Eekelaar, 1994a: 53). Eekelaar suggests that a person who surrenders to another the power to determine where his own welfare lies has in a real sense abdicated his personal responsibility (Eekelaar, 1994b). When applied in the context of judicial decision-making, this implies that the judiciary cannot respect children's rights and ignore their choices at one and the same time. This may well apply in other decision-making fora, such as the medical professional's decision regarding the right of the child to access identifying information about their donor. Eekelaar argues that while conceptions of children's best interests are strongly rooted in the self-images of world cultures (Eekelaar, 1994a), dynamic self-determinism 'appeals directly to *each individual child within each culture* and demands that such a child, as it develops, be allowed space *within the culture* to find its own mode of fulfilment' (Eekelaar, 1994a: 58). Eekelaar acknowledges, however, that the child's decision-making autonomy depends on their capacity for self-determination:

The very fact that the outcome has been, at least partly, determined by the child is taken to demonstrate that the outcome is in the child's best interests. The process is dynamic because it appreciates that the optimal course for a child cannot always be mapped out at the time of the decision, and may need to be revised as the child grows up. It involves self-determinism because the child itself is given scope to influence the outcomes (Eekelaar, 1994a: 47–48).

The Committee has similarly suggested that the evolving capacity of the child is inextricably linked to any determination of their best interests, and as a result, that it should be possible to re-assess the situation over time, and to make determinations anew where necessary:

In the best interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions ([Committee on the Rights of the Child, 2013d](#): para 84).

The Committee's General Comment No 12 states that Article 12 imposes an obligation on states to introduce the legal framework and mechanisms necessary to facilitate active involvement of the child in all actions affecting the child and in decision-making, and to fulfil the obligation to give due weight to those views once expressed ([Committee on the Rights of the Child, 2009b](#), para 12). General Comment No 12 further emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives ([Committee on the Rights of the Child, 2009b](#): para 13). The Committee has also stated the following:

Article 5 draws on the concept of 'evolving capacities' to refer to the processes of maturation and learning whereby children progressively acquire knowledge, competencies and understanding, including acquiring understanding about their rights and how they can best be realized . . . Evolving capacities should be seen as a positive and enabling process, not an excuse for authoritarian practices that restrict children's autonomy and self-expression and which have traditionally been justified by pointing to children's relative immaturity and their need for socialization ([Committee on the Rights of the Child, 2006b](#): para 17).

The Committee has made clear that Articles 3, 5 and 12 are inextricably linked:

General Comment No. 12 . . . highlights the inextricable links between articles 3, paragraph 1, and 12. The two articles have complementary roles: the first aims to realize the child's best interests, and the second provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his or her best interests . . . The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake . . . as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests ([Committee on the Rights of the Child, 2013d](#): 43–44).

Therefore, taking Articles 3, 5 and 12 together, it is suggested that children who are deemed to be sufficiently mature should be entitled to decide what is in their best interests. While the right to access donor information is presumed to be in the child's best interests within the Convention, in assessing whether the scenario is sufficiently 'extreme and unambiguous' to justify refuting the presumption, the decision-maker's discretion should be restricted by requiring them to take into account, and give due weight to, the views of the sufficiently mature child. Where the child is deemed to be sufficiently mature to understand the nature and consequences of the decision, the right to donor information should therefore be granted to the child, even in the face

of parental objection. In short, the presumption is that access to biological information is in the child's best interests; if there is any doubt about the child's competing rights, best interests should be determined by a decision-maker who has given due weight to the views of the sufficiently mature child. Therefore, the decision-maker's role will only be to determine the child's maturity: where the child is not sufficiently mature, the decision will be left the parents, and where the child is considered to be sufficiently mature, the decision-making power will be passed to the child.

Articles 5 and 12 also provide useful guidance for situations in which parents of donor-conceived children are not withholding consent, but where the child nonetheless wishes to obtain the information without the knowledge or guidance of their parents. The Convention places a strong emphasis on the autonomy of the child, in particular, the adolescent child, and thus the Convention provides that in certain circumstances, adolescents should be granted the same rights as adults. The Committee has therefore noted:

The Convention on the Rights of the Child defines a child as 'every human being below the age of 18 years unless, under the law applicable, majority is attained earlier' (art. 1). Consequently, adolescents up to 18 years old are holders of all the rights enshrined in the Convention; they are entitled to special protection measures and, according to their evolving capacities, they can progressively exercise their rights (art. 5) ([Committee on the Rights of the Child, 2003: para 1](#)).

The Convention allows that where adolescents have been deemed to be sufficiently mature, they are entitled to access medical treatment without parental consent. General Comment No 4 states that 'adolescents deemed mature enough to receive counselling without the presence of a parent or other person are entitled to privacy and may request confidential services, including treatment' ([Committee on the Rights of the Child, 2003, para 11](#)). The Committee continues:

Before parents give their consent, adolescents need to have a chance to express their views freely and their views should be given due weight, in accordance with article 12 of the Convention. However, if the adolescent is of sufficient maturity, *informed consent shall be obtained from the adolescent her/himself*, while informing the parents if that is in the 'best interest of the child' (art. 3) ([Committee on the Rights of the Child, 2003: para 32](#)). (Emphasis added)

According to Kilkelly, this approach:

[N]eatly demonstrates the gradual nature in which the parents' direct role in the protection of children's rights transfers to children as they acquire the maturity to undertake this role for themselves. This is an important principle given that the Convention applies to all those under 18 years, including babies and mature adolescents on the verge of adulthood ([Kilkelly, 2008: 29](#)).

The Convention thus foresees that the adolescent who is sufficiently mature is capable of making determinations about what is in their best interests, including in the medical context. This would involve an assessment of the child's maturity on a case-by-case basis. This is a welcome approach, because even if there are general developmental stages which serve as guideposts for assessing the intellectual capacity of the average child, children's levels of understanding are not uniformly linked to their biological age. Therefore, children below general age requirements set by law may be sufficiently mature to exercise their rights and responsibilities with respect to that law. If information, experience, environment, social, and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view, the decision-maker ought to be adopting a tailored approach to each individual case. Therefore, it is essential that the views of the child be assessed using a case-by-case examination.

The Committee has also endorsed general age requirements for children. It has, therefore, recommended that States Parties set minimum age requirements for sexual consent, marriage and the possibility of medical treatment without parental consent, which should 'closely reflect the recognition of the status of human beings under 18 years of age as rights holders, in accordance with their evolving capacity, age and maturity' (Committee on the Rights of the Child, 2003: para 8). Therefore, the Committee envisages that general age requirements, which do not include a capacity assessment, permitting adolescents to make important decisions about their lives, will be in line with the Convention. Decisions regarding whether to consent to marriage or to medical treatment could not be said, in principle, to have less of an impact on one's life than the decision to access donor information, so there is no reason to believe that the Committee's position on these matters would not extend by analogy to the donor conception context, allowing for the introduction of general age requirements (during minority) for donor-conceived children.

Applying the Committee's reasoning to the donor conception context, the Convention may require states to introduce legislation with generally applicable age requirements below the age of 18, permitting donor-conceived children to automatically access donor information. Examples of such an approach may be found in jurisdictions such as Austria, where donor-conceived children are entitled to access donor information at the general age of 14, and in the Netherlands, where donor information may be obtained at the general age 16. In addition, the Convention may require states to respect the evolving capacity of donor-conceived children, and thus require the national legislation to include an exception permitting the donor-conceived child, who has been deemed to be sufficiently mature (but who has not yet attained the general age set down in the relevant legislation), to decide whether or not to obtain genetic information, without the involvement of their parents. The foregoing approach is adopted in Victoria, Australia, where access to donor information is permitted when the child has attained 'sufficient maturity'. Sweden is a further example of a jurisdiction which permits access to donor information where the child is considered to have reached 'sufficient maturity'.

It is outside the scope of this article to engage in a detailed consideration of the problem of parental secrecy with regard to disclosure of the *fact* of donor conception. The Committee has not explicitly pronounced that states are under an obligation to

inform children of their donor-conceived status, but it should be noted that some jurisdictions, including Victoria, Australia, and Ireland (the relevant provisions of which have yet to be commenced) will use annotation of the birth certificate to present information about the donor-conceived child's status to enable the latter to make practical use of the right to identity.

#### *D. Conclusion*

It is clear that a presumption exists in favour of granting identity rights to the donor-conceived child. Such a presumption may only be rebutted in the most 'extreme and unambiguous' circumstances. Where the rights of the child and the rights of the parents were in conflict, such an assessment would in theory require a decision-maker to determine what is in the best interests of the child, leading to criticisms of vagueness and subjectivity. There may be rare situations in which the child's best interests are unambiguously at stake, such as the risk of death or serious injury, but in most instances the decision will be far more uncertain. The decision-maker's discretion can in fact be restricted by reading Articles 3, 5 and 12 together. Under this formulation, the decision-maker would determine whether the child was sufficiently mature to understand the nature and consequences of the decision, and where they were deemed to be so, the child would be entitled to decide whether or not they wish to access information relating to their genetic origins. Since the right to parental autonomy in Article 18 hinges upon the best interests principle, and since the child, when sufficiently mature, is considered under the Convention to be the best arbiter of their own interests, the sufficiently mature child's right to access donor information will supersede the parental objection. Where the child is not deemed to be sufficiently mature, the parents would be permitted to make the determination regarding best interests, but the child can be re-assessed at a later date, in accordance with their evolving capacity. This approach is also applicable in situations where the child wishes to bypass the parents' involvement in the process of obtaining donor information, irrespective of whether consent would or would not be forthcoming.

The Committee's interpretation of Articles 3, 5 and 12 lends support to the argument that donor-conceived children have a right to access donor information independently of their parents. Therefore, the Committee has recommended that states introduce laws with generally applicable age requirements permitting people under the age of 18 (e.g. age 16) to consent to decisions regarding marriage and medical treatment, for example. Moreover, the Committee has stated that children should be involved in decisions which impact upon their lives, and that due weight should be afforded to the child's perspective in accordance with their age and maturity. Where an adolescent is considered to be sufficiently mature, they will be entitled to make decisions, such as the decision to consent to medical treatment, without being required to involve their parents in the process. Determinations of sufficient maturity in this context would involve a case-by-case assessment.

Applying the Committee's reasoning to the donor conception context, the Convention may require states to introduce legislation with generally applicable age requirements below the age of 18, permitting donor-conceived children to automatically access donor information. The Convention would further require states to

respect the evolving capacity of donor-conceived children, and thus permit the donor-conceived child, who has been deemed to be sufficiently mature, to decide whether or not to obtain genetic information, without the involvement of their parents.

#### IV. CONCLUSION

This article began by providing a detailed analysis of the requirements of the right to identity within Articles 7 and 8 of the Convention. Following an original examination of the Concluding Observations of the Committee on the Rights of the Child between 2007 and 2017, it was concluded that the right to identity in the Convention extends not only to adoptees, but also to donor-conceived people. While the Convention system has been criticized in the past for its ineffectiveness in guaranteeing the right to identity in practice (for example, [Blyth and Farrand, 2004](#)), this article has suggested that it is essential that States Parties permitting donor conception appropriately translate the requirements of the Convention into domestic law, thereby recognizing the right of the donor-conceived *child*, as well as the donor-conceived adult, to access identifying donor information.

The article has further explored the means by which the donor-conceived child might access such information in practice. The Convention envisages that the donor-conceived child will be entitled to access the genetic information through their legal parents. It has been suggested above that the Convention may also require states to introduce legislation with generally applicable age requirements below the age of 18, permitting donor-conceived children to automatically access donor information. Furthermore, the article has emphasized that the Convention requires states to respect the evolving capacity and participations rights of donor-conceived children, and thus may require states to permit the donor-conceived child, who has been deemed to be sufficiently mature, to decide whether or not to obtain the relevant information, without necessarily involving parents in that decision.

#### NOTES

1. September 2017. The status of ratifications of the Convention is available on the website of the UN Office of the High Commissioner for Human Rights (OHCHR, 2017a).
2. It should be noted that the Fertility Society of Australia requires all clinics to adhere to National Health and Medical Research Council (NHMRC) guidelines in order to be accredited. NHMRC guidelines provide that clinics must release identifying information where the donor-conceived person, who has attained the age of maturity, requests such information. Therefore, while not all Australian jurisdictions have legislation governing disclosure of donor information, there is a regulatory system in place to enforce non-anonymity throughout Australia.
3. The Convention's third Optional Protocol, which entered into force in 2014, provides for a procedure through which alleged violations of the Convention may be communicated directly to the Committee.
4. UNICEF and the Committee on the Rights of the Child work closely together in practice, and thus the interpretations of the Convention's provisions outlined in the Handbook will also have been endorsed by the Committee ([UNICEF, 2014](#)).
5. The Human Fertilisation and Embryology (Disclosure of Donor Information) Regulations (2004) recognizes the general right of donor-conceived people (conceived from 1 April 2005) to access identifying information about their donors upon reaching the age of 18.
6. Czech Republic has recently taken steps to amend its Civil Code to include a specific provision on the right of the child to know their biological parents and to preserve their identity ([Committee on the Rights of the Child, 2011](#)) and Luxembourg has since taken steps to address the problem of anonymous births in that country, 'to reconcile anonymous birth with the preservation of identity of a child and the right of a child to know his or her origin' ([Committee on the Rights of the Child, 2013a](#), para 28).

7. As noted above, legislation has since been introduced in the UK providing for access to identifying donor information by the donor-conceived person on attaining the age of 18.
8. Blyth and Farrand examine the relevant statements of the Committee up to 2003.
9. Hodgkin and Newell examine the relevant statements of the Committee up to 2007.
10. At the time of writing (September 2017), the most recent Concluding Observations document published by the Committee on the Office of the High Commissioner website is dated 13 July 2017.
11. The Committee has also been critical of the Holy See's continued use of 'baby boxes' leading to the anonymous abandonment of children ([Committee on the Rights of the Child, 2014b](#)). Similar practices in India and Switzerland have been criticized by the Committee ([Committee on the Rights of the Child, 2014c](#); [Committee on the Rights of the Child, 2015](#)).
12. The best interests principle is also referred to in the Convention in relation to the separation of the child from his or her family (Article 9); parental responsibility for the upbringing and development of the child (Article 18); adoption and comparable practices (Articles 20 and 21) and in relation to the child's involvement with the justice system (Articles 37 and 40).
13. The other guiding principles in the Convention are: the right to non-discrimination; to participate; and to life, survival, and development.

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